DOES THIS COUNT? TRUMP V. UNITED STATES AND THE ROLE OF THE VICE PRESIDENT ON JANUARY 6TH

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ABSTRACT

The Supreme Court's decision in *Trump v. United States* drastically changed the landscape of presidential powers, all but creating a new level of presidential immunity for criminal offenses, so long as the actions giving rise to those criminal offenses are within the core official acts of that President. At the time, the Biden Administration's Justice Department was prosecuting then-former President Trump for his actions seeking to encourage his Vice President to overthrow the lawful 2020 election results on January 6, 2021. The Court adopted this new official acts doctrine, but did not exactly describe the standard of review for it, nor did the Court apply this new doctrine to President Trump's January 6 case. In the wake of *Trump v. United States*, Trump's subsequent reelection, and the lack of prosecution thereafter, the intersection of the new official acts doctrine and the Vice President's role at the January 6 ceremony remains unclear. This Note argues that any relevant interactions between a President and Vice President wherein the President seeks to pressure the Vice President to overthrow the results of a lawful election would more likely than not be outside the scope of a President's core official acts, thereby not qualifying for the presumptive immunity described by the Court in *Trump v. United States*.

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I. INTRODUCTION

On August 1, 2023, a federal grand jury indicted President Donald J. Trump on four counts,[1] amounting to the first criminal prosecution in American history of a former President for actions taken during his presidency.[2] The indictment alleged that after losing the 2020 election, Trump conspired to overturn the results of the election through a number of means, including by "spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of election results."[3]

The then-former President moved to dismiss the case "based on Presidential immunity."[4] U.S. District Court Judge Tanya S. Chutkan rejected President Trump's immunity claims in December of 2023,[5] but delayed his trial pending the resolution of his appeal.[6] The Court of Appeals for the District of Columbia Circuit unanimously upheld Judge Chutkan's decision.[7]

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[1] Trump v. United States, 603 U.S. 593, 602 (2024); *see* Esther Addley, *Donald Trump Indictment: What Are the Charges and What Happens Next?*, GUARDIAN (Aug. 2, 2023, at 5:12 EDT), https://www.theguardian.com/global/2023/aug/02/donald-trump-indictment-what-are-charges-what-happens-next [https://perma.cc/U383-ZV5Q].

[2] *Trump*, 603 U.S. at 593.

[3] *Id.* at 602.

[4] *Id.* at 603. The Supreme Court later represented Trump's claims as follows:
Trump argued that all of the indictment's allegations fell within the core of his official duties. And he contended that a President has absolute immunity from criminal prosecution for actions performed within the outer perimeter of his official responsibilities, to ensure that he can undertake the especially sensitive duties of his office with bold and unhesitating action.
Id. at 604 (citations omitted).

[5] United States v. Trump, 704 F. Supp. 3d 196, 203 (D.D.C. 2023).

[6] *Trump v. United States*, OYEZ, https://www.oyez.org/cases/2023/23-939 [https://perma.cc/4BPV-RR9G] (last visited Aug. 29, 2025, at 10:51 AM).

[7] United States v. Trump, 91 F.4th 1173, 1180 (D.C. Cir. 2024).

The United States Supreme Court, however, overturned the lower courts, ruling that a President has some form of criminal immunity for any official acts within the outer perimeter of his or her constitutional duties.[8] The Court did not, however, rule definitively on the facts of Trump's case, remanding the case back to the lower courts to determine whether Trump's actions on January 6, 2021 constituted official acts for which he is immune.[9] Three months away from a presidential election in which Trump was a major candidate, the Court furthermore did not define any operative test for this new official acts doctrine, instead leaving those questions to be answered by the lower courts.[10]

In the meantime, Trump went on to win the 2024 election, federal prosecutors dismissed their cases against Trump,[11] and President Biden's special counsel Jack Smith resigned shortly before the end of Biden's term,[12] leaving important questions still unanswered. These questions include: (1) What is the role of the Vice President during the counting ceremony on January 6 and (2) Would a President, like Trump, be immune from criminal prosecution under the new official acts doctrine if that President sought to illegally influence an election using the Vice President's role on January 6?

The special counsel's amended indictment[13] and final report to the Attorney General of the United States outlined Smith's beliefs that Trump could nevertheless have been prosecuted successfully.[14] This was based on the assertion that Trump committed treasonous acts in his private capacity as a candidate, even if some of Trump's

[8] *Trump*, 603 U.S. at 606.

[9] *Id.* at 630.

[10] *See id.* at 642 ("The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts. That immunity applies equally to all occupants of the Oval Office, regardless of politics, policy, or party. The judgment of the Court of Appeals for the D. C. Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion."); *id.* at 617 ("Although we identify several considerations pertinent to classifying those allegations and determining whether they are subject to immunity, that analysis ultimately is best left to the lower courts to perform in the first instance.").

[11] NPR Washington Desk, *Judge Grants Dismissal of Jan. 6 Case Against Trump*, NPR (Nov. 25, 2024, at 5:03 PM ET), https://www.npr.org/2024/11/25/nx-s1-5205376/jan-6-trump-case [https://perma.cc/466A-8U2Y].

[12] *Trump Prosecutor Jack Smith Resigns from Justice Department*, REUTERS (Jan. 13, 2025, at 10:39 AM EST), https://www.reuters.com/world/us/trump-prosecutor-jack-smith-resigns-justice-department-politico-reports-2025-01-11/ [https://perma.cc/WRE6-N74R].

[13] *See* Superseding Indictment at 1–2, United States v. Trump, No. 23-cr-00257 (D.D.C. Aug. 27, 2024) [hereinafter Amended Indictment].

[14] U.S. DEP'T OF JUST., FINAL REPORT ON THE SPECIAL COUNSEL'S INVESTIGATIONS AND PROSECUTIONS, VOLUME ONE: THE ELECTION CASE 33–34 (2025).

conspiratorial acts "attempted to use the power and authority of the United States Government in furtherance of his scheme."[15] However, curious scholars or any other interested parties likely will not have the opportunity to hear answers to these questions from a court of law anytime soon. Instead, these constitutional questions are left to the researchers and commentators themselves.

The Vice President is of course an Article II actor.[16] But the Vice President also serves an important role under Article I.[17] Separation of powers principles make it logical that any powers explicitly given to Article I actors like the House and Senate would consequently be outside the reach of powers given to the President under Article II.[18] These prescribed powers of the legislature, it follows, likely would not be within the scope of a President's official acts; these acts would belong to the legislature, a coequal and independent branch.[19] What is less clear is what happens with the case of the Vice President, who often performs duties and wields powers in their capacity as President of the Senate.[20] As indicated by the events of January 6, 2021, the Vice President, as President of the Senate, certainly has some role to play at the January 6 certification ceremony.[21] In the wake of *Trump v. United States*, Trump's subsequent reelection, and the lack of prosecution thereafter, the intersection of the new official acts doctrine and the Vice President's role on January 6 remains unclear. Future Presidents may be willing to try a similar January 6 gambit in the future to overturn an otherwise unwanted election result.

If the Vice President's role on January 6 represents an Article II power, any pressure by Trump to persuade Pence to influence the counting ceremony is likely an official act for which Trump would be immune.[22] The Supreme Court agreed with this logic; it held that

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[15] *Id.* at 2, 33–34.

[16] U.S. CONST. art. II § 1.

[17] U.S. CONST. art. I § 3 ("The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.").

[18] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

[19] *See* U.S. CONST. art. I, § 1; *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring).

[20] U.S. CONST. art. I, § 3, cls. 4–5; *see President of the Senate*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("The Vice President of the United States in the capacity of presiding officer of the U.S. Senate. The Vice President has a vote in the Senate only if a tiebreaker is needed. Whenever the Vice President is absent, a president pro tempore presides." (citation omitted)).

[21] *See* Jill Colvin & Zeke Miller, *Pence Defies Trump, Affirms Biden's Win*, AP NEWS (Jan. 7, 2021, at 3:48 AM EDT), https://apnews.com/article/mike-pence-electoral-vote-d27490021b4203087043df1939b82f8b [https://perma.cc/WD8T-U3L8].

[22] *See* Trump v. United States, 603 U.S. 593, 623 (2024).

because presiding over the January 6 ceremony is a constitutional and statutory duty of the Vice President, the indictment's allegations about Trump pressuring Pence "thus involve official conduct, and Trump is at least presumptively immune from prosecution for such conduct."[23] However, if the Vice President's role as President of the Senate is more so an Article I power than an Article II power, indeed if the role is not an Article II power at all, Trump and subsequent Presidents may not be immune at all.[24] The hypothetical thus depends upon where along that spectrum those powers lie.[25]

This Note considers two principal questions. First, contemporary to January 6, 2021, what was the role of the Vice President in the counting ceremony of Electoral College votes? Second, in the wake of developments in the law subsequent to January 6, 2021, including the Supreme Court's decision in *Trump v. United States*, to what extent is a President immune from criminal prosecution for any actions seeking to influence the conduct of a Vice President relating to the Electoral College counting ceremony on January 6?

This Note argues that the prevailing bodies of law, the history of the Electoral College and the Vice Presidency, the legislative history of the Electoral Count Act of 1887 (ECA), and the dominant theories in the secondary literature all suggest that the Senate President's role at the January 6 ceremony encompasses powers that—to the extent that such a role encompasses *any* non-ministerial powers—are outside the scope of Article II. Thus, this Note argues that any relevant interactions between a President and Vice President wherein the President seeks to pressure the Vice President to overthrow the results of a lawful election would more likely than not be outside the scope of a President's core official acts, assuming these would be official acts at all.

Part II will discuss *Trump v. United States*, the preliminary determinations made by the Supreme Court therein about official acts, and any questions that remain unanswered in the federal courts.[26] Part III will begin an analysis of those unanswered

[23] *Id.*

[24] *See* discussion *infra* Part V.

[25] Another potentiality is that, even if the Vice President's role on January 6 is primarily an Article I function, an Article II actor such as President Trump could nonetheless seek to influence the certification of the election through official acts. In other words, seeking to influence the January 6 proceeding could be interpreted as similar to how any President encourages Members of Congress to support the President's legislative goals. Even if that encouragement treads into the realm of Article I, it nevertheless is as commonly understood as an official act of the President as any. *See Trump*, 603 U.S. at 624.

[26] *See infra* Part II.

questions.[27] It discusses the historic nature of the Vice President on and relating to the January 6 certification ceremony, including: analysis of the original Framers' Constitution[28]; changes made to (or clarification of) that landscape in the Twelfth Amendment[29]; and the developments written into law by the Electoral Count Act of 1887 and the Electoral Count Reform Act from 2022 (ECRA).[30] Part IV will discuss the prevailing secondary literature contemporary to the time of this Note's writing to determine whether a consensus among scholars, researchers, and other commentators exists as to these questions.[31] Part V will, synthesizing the determinations of the prior Parts, discuss whether a President makes an official act when that President seeks to illegally influence a presidential election through encouraging the Vice President to reject certain slates of electors at the counting ceremony on January 6.[32]

II. INTO THE TWILIGHT ZONE[33]: *TRUMP V. UNITED STATES*

Chief Justice Roberts delivered the opinion of the Court in *Trump v. United States* in which Justices Thomas, Alito, Gorsuch, and Kavanaugh joined and in which Justice Barrett joined in all but Part III-C.[34] The three Justices appointed by Democratic Presidents dissented, underscoring further the ties between this case and the country's contemporary politics.[35] President Trump's case had as many dissenting Justices as he had appointees to the Court at the time; no Justices recused themselves from reviewing the case.[36]

Moreover, oral arguments in this case presented passionate discussion, further underscoring the case's importance to, and

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[27] *See infra* Part III.

[28] *See infra* Part III.A; U.S. CONST. art. I § 3, cl. 4; U.S. CONST. art. II § 1, cl. 3.

[29] *See infra* Part III.B; U.S. CONST. amend. XII.

[30] *See infra* Part III.C; Electoral Count Act of 1887, Pub. L. No. 49-90, 24 Stat. 373 (amended 2022). The 2022 amendments to the ECA came as a result of January 6, 2021. *See* Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117-328, 24 Stat. 5233. As the key facts pertaining to President Trump's case predate the 2022 reforms, those reforms are not the binding law in Trump's case, but they nevertheless can offer insight into lawmakers' subjective perceptions of what the ECA meant, and their intent in seeking to amend the ECA to clarify portions of it. *See* discussion *infra* Part V.

[31] *See* discussion *infra* Part IV.

[32] *See* discussion *infra* Part V.

[33] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a *zone of twilight* in which he and Congress may have concurrent authority, or in which its distribution is uncertain." (emphasis added)).

[34] Trump v. United States, 603 U.S. 593, 600 (2024).

[35] *See id.* at 657 (Sotomayor, J., dissenting).

[36] *See id.* at 600.

ramifications for, the American political system. "If the president decides," asked Justice Sotomayor at oral argument, "that his rival is a corrupt person and he orders the military or orders someone to assassinate him, is that within his official acts for which he can get immunity?"[37] Mr. D. John Sauer, counselor for President Trump, responded, "It would depend on the hypothetical. We can see that *could well be an official act*."[38]

Recall that Chief Justice Roberts, writing for the Court, assigned to the case the following central question: "Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office."[39] Noting a lineage of presidential power and presidential immunity cases such as *Youngstown Sheet & Tube Co. v. Sawyer*[40] and *Nixon v. Fitzgerald*,[41] Roberts answered:

> We conclude that under our constitutional structure of separated powers, the nature of Presidential power *requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office*. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity. At the current stage of proceedings in this case, however, we need not and do not decide whether that immunity must be absolute, or instead whether a presumptive immunity is sufficient.[42]

The Court held that the presidential immunity so described is absolute where the President acts within the scope of their "core constitutional powers."[43] Where the President acts outside those core powers, the immunity is at least presumptive.[44] Whether a President's—like Trump's—attempts to sway the President of the Senate to influence the results of an election through rejecting certain ballots at the January 6 counting ceremony are entitled to

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[37] Transcript of Oral Argument at 9, *Trump*, 603 U.S. 593 (No. 23-939).
[38] *Id.* (emphasis added).
[39] *Trump*, 603 U.S. at 605.
[40] *Id.* at 605–06 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).
[41] *Trump*, 603 U.S. at 606 (citing Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982) (discussing presidential immunity from civil liability for acts within the President's official powers)).
[42] *Trump*, 603 U.S. at 606 (emphasis added).
[43] *Id.*
[44] *Id.* But that presumption in turn begets an opportunity for opponents to rebut such presumptive immunity. *See id.* at 597-98.

absolute immunity likely depends in large part on whether such communications between President and Vice President are within the scope of that President's "core constitutional powers."[45]

Indeed, the Court reasoned that "not all of the President's official acts fall within his 'conclusive and preclusive' authority," explaining that the "zone of twilight" that Justice Jackson described in *Youngstown* often applied, wherein a President and Congress "may have concurrent authority."[46] However, the Court reasoned furthermore that the President's "unique position in the constitutional scheme"[47] led the Framers to "accordingly [vest] the President with 'supervisory and policy responsibilities of the utmost discretion and sensitivity.'"[48]

The reasoning in *Fitzgerald*, often quoted by the Court in *Trump v. United States*, was that the importance of a President's ability to act decisively and candidly within the scope of their official powers is a more important constitutional interest than the civil litigation interest of a former employee who believed they were wrongfully terminated.[49] However, the *Trump* Court held that "[a]s for a President's unofficial acts, there is no immunity," citing to principles "set out in *Clinton v. Jones*."[50]

Again, the essential question for this inquiry and others therefore becomes whether a President's given act is official, unofficial, or somewhere in between.[51] Indeed, the Court reasoned that certain allegations "such as those involving Trump's interactions with the Vice President [on and relating to January 6] . . . present more difficult questions."[52] The Court wrote that such analysis "ultimately is best left to the lower courts to perform in the first instance."[53]

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[45] *See id.* at 606. The Court described these core powers as stemming "either from an act of Congress or from the Constitution itself" and that "[i]n the latter case, the President's authority is sometimes 'conclusive and preclusive.'" *Id.* at 607 (first quoting *Youngstown*, 343 U.S. at 585; then quoting *id.* at 638 (Jackson, J., concurring)).

[46] *Trump*, 603 U.S. at 609 (quoting *Youngstown*, 343 U.S. at 635, 637 (Jackson, J., concurring)).

[47] *Trump*, 603 U.S. at 610 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982)).

[48] *Trump*, 603 U.S. at 610–11 (quoting *Fitzgerald*, 457 U.S. at 750).

[49] *See Fitzgerald*, 457 U.S. at 756–58. *See generally Trump*, 603 U.S. 593 (quoting *Fitzgerald* to support its analysis of Trump's immunity claim).

[50] *Trump*, 603 U.S. at 615 (citing Clinton v. Jones, 520 U.S. 681, 684 (1997) (holding that a sitting President could be subject to a civil lawsuit for actions done before taking office as President)).

[51] *See Trump*, 603 U.S. at 617 ("Critical threshold issues in this case are how to differentiate between a President's official and unofficial actions, and how to do so with respect to the indictment's extensive and detailed allegations covering a broad range of conduct").

[52] *Id.* at 603, 617.

[53] *Id.* at 617. However, the lower courts likely will not get the chance to analyze this inquiry, at least not in the near future. *See Trump Prosecutor Jack Smith Resigns from Justice Department*, *supra* note 12. On January 10, 2025, U.S. Special Counsel Jack Smith resigned as

At oral argument, Justice Barrett's and Justice Jackson's exchange with Michael R. Dreeben, Counselor to the Special Counsel, presented similar questions.[54] Justice Barrett asked, "if we decided that there were . . . some official acts immunity . . . [is it] another option for the Special Counsel to just proceed based on the private conduct and drop the official conduct?"[55] Justice Jackson asked further questions, wondering if there would be "sufficient allegations in the indictment" based on "private acts" alone such that "the case should be allowed to proceed."[56] Mr. Dreeben answered Justice Jackson in the affirmative.[57]

Despite writing that such analysis about the nature of any individual acts "ultimately is best left to the lower courts to perform in the first instance,"[58] the Court's final opinion identified "several considerations pertinent to classifying those allegations [about Trump's contact with Pence] and determining whether they are subject to immunity."[59] The Court noted that the Vice President and President are closely tied structurally under the Constitution, and that "[i]t is thus important for the President to discuss official matters with the Vice President to ensure continuity within the Executive Branch and to advance the President's agenda in Congress and beyond."[60]

Additionally, the Court held that "[p]residing over the January 6 certification proceeding . . . is a constitutional and statutory duty of the Vice President. The indictment's allegations that Trump attempted to pressure the Vice President to take particular acts in connection with his role at the certification proceeding thus involve official conduct," for which "Trump is at least presumptively immune."[61]

However, the Court also determined that "the Vice President's Article I responsibility of presiding over the Senate is not an executive branch function."[62] The Court noted Congress's extensive legislation defining the Vice President's role at the counting, stating

President Trump prepared to return to the White House for a second term. *Id.* It is doubtful that a Trump Justice Department will consider prosecuting the President for conspiracy to overthrow the 2020 election.

[54] Transcript of Oral Argument, *supra* note 37, at 163–166.

[55] *Id.* at 163.

[56] *Id.* at 166.

[57] *Id.*

[58] *Trump*, 603 U.S. at 617.

[59] *See id.* at 617–19.

[60] *Id.* at 621–23.

[61] *Id.* (citation omitted)

[62] *Id.* at 624 (internal quotations omitted).

that "the President plays no direct constitutional or statutory role in that process."[63] Nevertheless, the Court reasoned that the President has extensive interactions of their own with the Vice President's role as President of the Senate, especially considering "the Vice President's tiebreaking vote."[64] Though the Court refused to opine on the final issue of whether Trump is immune from prosecution for his actions relating to Vice President Pence and the January 6 counting ceremony, it did assert that "Trump is at least presumptively immune" for those actions and also outlined a crucial argument to rebut that presumption.[65]

Justice Sotomayor attacked the Court's move "to create expansive immunity for all official acts," writing, "[w]hether described as presumptive or absolute, under the majority's rule, a President's use of any official power for any purpose, even the most corrupt, is immune from prosecution. That is just as bad as it sounds, and it is baseless."[66] Justice Sotomayor furthermore argued that "[t]his official-acts immunity has 'no firm grounding in constitutional text, history, or precedent.'"[67]

Justice Sotomayor's dissent argued that the Framers of the Constitution understood how to give certain actors criminal immunity, such that their refusal to do so for Presidents is demonstrative of their original intent here.[68] Indeed, she writes that the "historical evidence reinforces that, from the very beginning, the presumption in this Nation has always been that no man is free to flout the criminal law."[69] Additionally, she noted the argument of President Trump's own lawyers at his second impeachment trial, who "insisted [to United States Senators] that a former President is like any other citizen and can be tried in a court of law."[70]

Despite Justice Sotomayor's rebuke of the Court's decision, it is nevertheless the majority decision, and thus researchers and litigators must now consider the scope of a President's official acts. The next section of this Note begins discussion of these remaining questions, first by analyzing the text of the pertinent Constitutional provisions themselves and the original intent therein.

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[63] *Id.*
[64] *Id.*
[65] *See id.* at 602–03, 617, 623–25.
[66] *See id.* at 659 (Sotomayor, J., dissenting) (internal quotations omitted).
[67] *Id.* at 660 (quoting Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 280 (2022)).
[68] *See Trump*, 603 U.S. at 661 (Sotomayor, J., dissenting) ("If the Framers 'had wanted to create some constitutional privilege to shield the President . . . from criminal indictment,' they could have done so. They did not." (alteration in original) (citation omitted)).
[69] *Id.* at 663–64.
[70] *Id.* at 665.

III. HISTORIC ROLE OF THE SENATE PRESIDENT

A. The Original Text of the Constitution

Whether a President makes an official act when illegally seeking to overthrow the results of an election through the Vice President's role on January 6 depends on the constitutional scope of the Vice President's role at the January 6 ceremony.[71] Any inquiry into the constitutional role of the Vice President should begin with the text of the Constitution itself, not least because the Constitution's raw text represents the product of the Framer's original intent.[72] The Constitution, in pertinent part, reads that "[t]he President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates and the votes shall then be counted."[73] However, the same clause also states (and in fact, that clause states the following *before* the preceding quote)

> The Electors shall meet in their respective States, and vote by Ballot for two Persons. . . . And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit . . . directed to the President of the Senate.[74]

It is clear then that the Electors do the actual voting, but—as many have argued[75]—the remainder of the text is rather vague.

One scholar writes that "deciding on the method of electing the President bedeviled the Constitutional Convention,"[76] citing Alexander Hamilton in *The Federalist*: "There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it . . . ."[77] James Madison later wrote that "[t]he difficulty of finding an unexceptionable process for appointing the Executive Organ of a Government such as that of the U.S., was deeply felt by the Convention."[78]

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[71] *See id* at 609–10 (majority opinion).

[72] On origins (and other things), see generally *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, 1475 n.6 (1975).

[73] U.S. CONST. art. II, § 1, cl. 3; *id.* amend. XII.

[74] *Id.* art. II, § 1, cl. 3.

[75] *See e.g.*, Joel K. Goldstein, *The Ministerial Role of the President of the Senate in Counting Electoral Votes: A Post-January 6 Perspective*, 21 UNIV. N.H. L. REV. 369, 383 & n.76 (arguing that "[m]any criticize the text as ambiguous" and collecting sources doing so).

[76] Alexander Gigante, *Hanging by a Thread: The Electoral Count Act's Threat to America's Democracy*, 15 GOV'T L. REV. 42, 45 (2022).

[77] *Id.* (quoting The FEDERALIST NO. 67 (Alexander Hamilton)).

[78] Gigante, *supra* note 76, at 46 (alteration in original) (quoting Letter from James Madison to George Hay (Aug. 23, 1823), https://founders.archives.gov/documents/Madison/04-03-02-0109 [https://perma.cc/529A-MGK9]).

Alexander Gigante additionally reports that a September 4, 1787 draft of the relevant clause would have read "[t]he Legislature may determine the time of chusing [sic] and assembling the Electors, *and the manner of certifying and transmitting their votes*."[79] That the emphasized text is not in the final version, argues Gigante, shows that the Framers did not intend Congress to have "the power also to determine 'the manner of certifying and transmitting'" the Electors' votes.[80]

Professor Joel K. Goldstein offers a compelling case that the Constitution does not make the Senate President any sort of presiding officer over the actual counting.[81] He even calls the opening a "chore" that "requires a Senate president to attend," but that "someone can receive and open mail without occupying the center chair; the corner office occupant doesn't typically open the mail."[82] Furthermore, and transitioning the analysis away from only the raw text, Goldstein turns to the Constitutional Convention, reporting that an earlier draft of the 1787 text did not include the House at all; only the Senate.[83] Were the Senate alone responsible for the opening of votes, its President would be present at such a ceremony.[84] That the House was included afterwards, argues Goldstein, should not be mistaken to ascribe extra power to the President of the Senate, just because they were by appearances presiding over a joint session.[85] Goldstein writes that "[t]he President of the Senate presides then, by custom and the ECA, not by a textual constitutional grant. No implied power, to count electoral votes or otherwise, can come from a non-existent textual grant to preside."[86]

The text, and the history of its drafting as revealed by the records of the Federal Convention of 1787, do not support implied powers on the level that President Trump's lawyers were discussing in January

[79] Gigante, *supra* note 76, at 47, 48 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 494 (Max Farrand ed., Yale Univ. Press 1911)).
[80] Gigante, *supra* note 76, at 48, 49.
[81] *See* Goldstein, *supra* note 75, at 385.
[82] *Id.* at 386.
[83] *See id.* (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 79, at 497–98) ("The President of the Senate shall, in that house, open all the certificates; and the votes shall be then and there counted.").
[84] *See* Goldstein, *supra* note 75, at 386.
[85] *See id.* at 386–89 ("The creation of a joint Senate-House gathering to open and count the electoral votes eliminated the earlier logic behind the President of the Senate presiding . . . . The Senate and House had to assemble somewhere, and meeting in the Senate chamber in 1789 made it natural that its president would preside.").
[86] *Id.* at 387.

2021.[87] Nevertheless, this text was changed via the Twelfth Amendment after the electoral crisis in 1800, with the goal of clarifying the above-discussed language.[88]

B. The Twelfth Amendment

The Framers of the Twelfth Amendment use the active voice when ascribing the *opening* of "all the certificates," and it is clear that this opening shall be done "in the presence of the Senate and House of Representatives."[89] Yet, after the House and Senate have been introduced as characters in this story, the passive voice is then used when discussing the *counting* of the votes.[90] Meanwhile, the state-level Electors are given the power to do the actual voting.[91] However, these state-level Electors also "sign and certify" their ballots.[92]

Jack Beerman and Gary Lawson contend that "[w]hile the Twelfth Amendment is strangely silent about who actually counts the votes in the certificates, the action prescribed in the amendment is *counting*, not *judging*."[93] Though both this survey of the secondary research and the primary material show that the Senate President likely did not have any affirmative counting or certifying power under the Framers' version of the Constitution, this primary material only represents the state of the Vice President's role up to the time of the Twelfth Amendment.[94] Further developments to the counting of Electoral College votes came via Congress after subsequent constitutional crises in the 19th Century.[95]

C. The Electoral Count Act of 1887

After a "relative calm" of Electoral College counting following the Twelfth Amendment's ratification, the Election of 1876 sparked over a decade of drafting and debating updates to the law governing the

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[87] *See id.* at 386–89; U.S. CONST. art. II, § 1, cl. 3; THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 79, at 494, 497–98.
[88] *See* U.S. CONST. amend. XII; *Goldstein*, *supra* note 75, at 393.
[89] U.S. CONST. amend XII; U.S. CONST. art. II, § 1, cl. 3.
[90] U.S. CONST. amend XII.
[91] *Id.*
[92] *Id.*
[93] Jack Beermann & Gary Lawson, *The Electoral Count Mess: The Electoral Count Act of 1887 Is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) About Counting Electoral Votes*, 16 FIU L. REV. 297, 298 (2022).
[94] *See* discussion *supra* Section III.A, III.C.
[95] *See* discussion *infra* Section III.C.

counting of electoral votes.[96] The result of Congress's efforts was the Electoral Count Act of 1887, wherein one commentator notes "[m]any of its substantive rules are set out in a single sentence that is 275 words long."[97] As discussed below, scholars have scrutinized the ECA closely, and many among them assert that it is unconstitutional.[98] Just as a 'Framers' version'[99] of the Constitution and the Twelfth Amendment can be analyzed to ascertain the role of the Senate President, so too can the intent of the framers of the ECA.

One scholar notes the "fundamental dilemma" that the enacting and debating Congresses faced when drafting a statute for "'a quiet, orderly, accepted, lawful method of deciding [the] vexed and troublesome question' of electoral vote counting."[100] The ECA's drafters balked at the idea of one person unilaterally being able to certify or discredit electoral votes.[101] On the other hand, the drafting

[96] Gigante, *supra* note 76, at 62–66; *see also* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 542–43 (2004) (noting "fourteen years of sustained debate").

[97] Siegel, *supra* note 96, at 542–43 ("The ECA is turgid and repetitious. Its central provisions seem contradictory. Many of its substantive rules are set out in a single sentence that is 275 words long. Proponents of the law admitted it was 'not perfect.' Contemporary commentators were less charitable. John Burgess, a leading political scientist in the late nineteenth century, pronounced the law unwise, incomplete, premised on contradictory principles, and expressed in language that was 'very confused, almost unintelligible.' At least he thought the law was constitutional; others did not." (footnotes omitted)).

[98] *See* discussion *infra* Part IV.

[99] For word choice insight, *see generally* Raisa Brunner, *Here's Why Taylor Swift is Re-Releasing Her Old Albums*, TIME (Aug. 2, 2024, at 1:03 PM EDT), https://time.com/5949979/why-taylor-swift-is-rerecording-old-albums/ [https://perma.cc/9VGC-FU3Y] (describing Taylor Swift's efforts to re-record and re-release her first six albums as "Taylor's Version" after the sale of her early catalog).

[100] Siegel, *supra* note 96, at 547 (citing 8 CONG. REC. 161 (1878) (statement of Sen. Bayard)).

[101] *See* Siegel, *supra* note 96, at 547–48. Representative Findlay stated,

> It has been demonstrated time and again that the political conscience is a flexible and elastic rule of action that readily yields to the slightest pressure of party exigencies . . . . When the great office of President is at stake, with the immense patronage at its disposal, it would be expecting too much of human nature, under the tyranny of party, to omit any opportunity to accomplish its ends, more especially under that loose code of morals which teaches that all is fair in politics, as in war or in love.

Id. at 547–48 (alteration in original) (quoting 15 CONG. REC. app. at 311 (1884) (statement of Rep. Findlay)). Senator Benjamin Hill stated,

> [Rather than] rise above party and remember [their] country and only [their] country, . . . [a]ble men, learned men, distinguished men, great men in the eyes of the nation, seemed intent only on accomplishing a party triumph, without regard to the consequences to the country. That is human nature. That is, unfortunately, party nature.

Siegel, *supra* note 96, at 548 (alteration in original) (quoting 8 CONG. REC. at 168 (1878) (statement of Sen. Hill)). Representative Thomas Browne

> [C]oncluded that he would even 'fear myself . . . if I were supreme judge upon such a question. I should fear to take upon myself the responsibility of settling a question of this character; I should fear that my judgment might be found in the line of my political convictions and party prejudices.'

Congress recognized "that there had to be a final decision-maker" in tightly contested elections, "be it a person, tribunal, or institution."[102]

> In enacting the ECA, Congress relied on three fundamental premises concerning its role in presidential elections: Congress, organized as two independent houses, has the right to count electoral votes; Congress's right to count votes includes the right to settle disputes over whether a vote is entitled to be counted; and Congress can regulate how it counts electoral votes through legislation, concurrent rule, or joint rule.[103]

It is clear, however, that the drafters of the ECA did not envision the presidency governing disputes as to its own electoral votes, even if those same drafters did have some disagreements over who did govern such disputes.[104] The drafters of the ECA had the benefit of reading histories of the Twelfth Amendment,[105] and had lived experiences of the Election of 1876, where conflicts of interest sparked constitutional crisis.[106] Some "congressmen argued that the electors would authenticate their own acts and the states' right to appoint electors *included the power to determine all questions regarding the legality of their vote*."[107] Still others "with a more nationalist perspective . . . conceived presidential elections as a federal matter. According to these congressmen, Congress properly had a role in assessing the legality of the electoral votes that came before it . . . ."[108] This debate is emblematic of nineteenth-century

Siegel, *supra* note 96, at 548 (alteration in original) (quoting 13 CONG. REC. at 5145 (1882) (statement of Rep. Browne)).

[102] Siegel, *supra* note 96, at 547.

[103] *Id.* at 550. The third of these assertions is central to the debate over the ECA's constitutionality. Opponents of the ECA's constitutionality argue that Congress did not have the power under the Constitution to change the manner of counting electoral votes without Constitutional amendment. *See, e.g.*, Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1758 (2002) ("Anyone who wishes to argue that the Electoral Count Act is constitutional must grapple with the threshold question of whether and where Congress has the power under the Constitution to enact such a statute."). Professor Stephen A. Siegel also notes that each of these premises were quite controversial at the time and that plenty of nineteenth-century congressmen doubted them. Siegel, *supra* note 96, at 550.

[104] *See* Siegel, *supra* note 96, at 550.

[105] The Election of 1800 sparked a constitutional crisis, one may recall, because an electoral vote dispute was left to be adjudicated by a then-Vice President who was also one of the candidates (Jefferson resolved said dispute in favor of himself). *See* Gigante, *supra* note 76, at 59–60.

[106] *See id.* at 62–66.

[107] Siegel, *supra* note 96, at 556 (emphasis added); *see id.* at 556 n.81–83.

[108] *Id.* at 556–57 (footnote omitted) (citing 18 CONG. REC. 48 (1886) (statement of Rep. Cooper); 13 CONG. REC. 2650 (1882) (statement of Sen. Morgan); 13 CONG. REC. 2645 (1882) (statement of Sen. Pugh); 10 CONG. REC. 4492 (1880) (statement of Rep. Hunton)).

constitutional debates writ large; most important was whether a given power was the right of the States or the federal government.[109] But no mention of the presidency itself is implicated in this debate; where contemporary congressmen took the nationalist side here, they assumed the powers belonged to Congress.[110] It is clear, then, that the ECA's enacting Congress—though it had myriad intentions in enacting the ECA—had none that included giving adjudicative power to the vice presidency.

IV. SUMMARY OF SCHOLARSHIP

In the years since the enactment of the ECA, scholars have debated its provisions just as they do any other Act of Congress that is as important to the procedures of American democracy. A brief survey of the state of the scholarship regarding the ECA is required at this juncture as a preliminary matter toward understanding any contributions that should be made to that scholarship in the wake of both January 6, 2021, and the Court's decision in *Trump v. United States*. Two main questions within the scholarship are important to this Note.

First, as the conversation has evolved over time, scholars have disagreed on the constitutionality of the ECA.[111] Particular attention to the ECA grew in the wake of *Bush v. Gore*.[112] However, the scholarship overall has been relatively robust ever since,[113] as the electorate has grown only more divided and the various results of presidential elections since 2016 have grown more contentious.[114] Indeed, scholars affiliated with an interest group called "Make Every Vote Count," which advocates for replacing the Electoral College altogether with a national popular vote, have asserted that "the cumbersome and ambiguous terms of the" ECA beget "numerous opportunities for mischief."[115]

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[109] *See* Siegel, *supra* note 96, at 551, 557, 633; Kesavan, *supra* note 103, at 1750, 1760, 1769.

[110] *See* Siegel, *supra* note 96, at 556–57.

[111] *See, e.g.*, Kesavan, *supra* note 103, at 1660–61, 1660 n.18.

[112] *See* Bush v. Gore, 531 U.S. 98 (2000) (per curiam); Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 RUTGERS J. L. & PUB. POL'Y 340, 341 (2016).

[113] *See* discussion *infra* Part IV.

[114] *See* Robert J. Delahunty & John Yoo, *Who Counts: The 12th Amendment, the Vice President, and the Electoral Count*, CASE W. RSRV. L. REV. 27, 29, 32–33 (2022); Kate Hamilton, *State Implementation of the Electoral Count Reform Act and the Mitigation of Election-Subversion Risk in 2024 and Beyond*, 133 YALE L. J. 249, 258 (2023).

[115] Mark Bohnhorst, Reed Hundt, Kate E. Morrow, & Aviam Soifer, *Presidential Election Reform: A Current National Imperative*, 26 LEWIS & CLARK L. REV. 437, 439 (2022); *About Us*, MAKING EVERY VOTE COUNT, https://www.makingeveryvotecount.com/mission-2 [https://perma.cc/A7FB-TFKW] (last visited Sep. 1, 2025, at 10:33 PM EDT). The Authors are

Second, scholars have pondered who possesses the power to count at the procedural counting of Electoral College votes, which typically occurs on January 6.[116] The two questions are, of course, related, but the second is of greater import to this paper, not least because Congress has updated the ECA since January 6, 2021.[117]

The vast majority of scholarship—though for various reasons—is of the opinion that the Vice President holds no adjudicative power at the January 6 certification of the Electoral College results. Professor Stephen A. Siegel, writing shortly after *Bush v. Gore* and aiming his article at "conscientious Congressm[e]n," describes in part that some of the complications surrounding the ECA harken back to its own drafting.[118] He contributes that the Congress enacting the ECA "faced a fundamental dilemma."[119] That dilemma was, he writes, that "Congress knew that there had to be a final decision-maker," while also understanding "that in a close presidential election, no decision-maker . . . could be trusted to render a neutral decision according to rules laid down in advance."[120] Nevertheless, if anyone present at the counting of Electoral College votes has some final adjudicative power over disputes to any slates of electors, *someone* must.[121]

Professor Stephen A. Siegel argues that Congress has the right to count electoral votes and settle disputes over whether a vote deserves to be counted.[122] Indeed, he concludes in part that the ECA

affiliated with Make Every Vote Count (*see* Bohnhorst, Hundt, Morrow, & Soifer, *supra* note 115, at 437), which identifies itself as a "501(c)(3) nonprofit, nonpartisan organization, dedicated to electing the president by a national popular vote." MAKING EVERY VOTE COUNT, *supra* note 115.

116 *See* Delahunty & Yoo, *supra* note 114, at 56–61.

117 Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117-328, 24 Stat. 5233. Of course, the Act of Congress that post-dates President Trump's actions seeking to influence Vice President Pence on and relating to January 6, 2021, are not the governing law in such a case. Therefore, there is an extent to which the constitutionality of the ECA is pertinent to any discussion of *Trump v. United States*. Still, as discussed below, whether the ECA is constitutional may yet be a moot point. *See infra* notes 149–50 and accompanying text.

118 Siegel, *supra* note 96, at 541–43.

119 *Id.* at 547.

120 *Id.*

121 It may be argued instead that no one at the counting procedures has any adjudicative power, because in the end, the States are the bodies that send the slates of electors to Congress to be counted. However, there has always been mechanisms to object to those slates of electors, so there likely is some adjudicative power to resolve disputes over those objections. *See* Delahunty & Yoo, *supra* note 114, at 58–59. Whether those objections amount to any adjudicative power in itself is another question.

122 Siegel, *supra* note 96, at 550. However, Professor Siegel notes that this was a controversial idea at the time of the ECA's ratification:

> In enacting the ECA, Congress relied on three fundamental premises concerning its role in presidential elections: Congress, organized as two independent houses, has the right to count electoral votes; Congress's right to count votes includes the right to settle disputes

"minimizes" the President of the Senate's role in adjudicating disputes because of either of the following: the President of the Senate's constitutional role is that of a "custodian of the states' electoral packets," or the statutory role is that of a "presiding officer" of what is actually Congress' "vote counting session."[123] Therefore, it would follow from his conclusions that the President of the Senate has no adjudicative power over the vote counting session.[124]

Another scholar argues that those claiming the Vice President, rather than Congress, has the counting power crucially misunderstand the very nature of the role of the Senate President.[125] This camp in the scholarship, so argues Professor Derek T. Muller, uses the terms Vice President and President of the Senate interchangeably,[126] which he calls "a categorical error."[127] "In short," writes Muller, "the President of the Senate is sometimes the Vice President, sometimes not. The structural role of the President of the Senate *as a legislative officer* in Congress weighs heavily in favor of a recognition that Congress . . . holds the power to count electoral votes and resolve disputes."[128]

For Muller and commentators in his camp, the President of the Senate is more accurately described as an office whose occupant often changes.[129] This may at first appear to be an argument over semantics, but it is important to the wider inquiry above. If the Vice President were the sole officer entitled to status as the President of the Senate, then any questions regarding official acts would be resolved differently. Instead, if the President of the Senate were a

> over whether a vote is entitled to be counted; and Congress can regulate how it counts electoral votes through legislation, concurrent rule, or joint rule. Throughout the nineteenth century, these premises were quite controversial. Many nineteenth-century congressmen doubted them, including some who voted for the ECA.

Id.

123 *Id.* at 652.

124 *See id.* at 651–52.

125 *See* Derek T. Muller, *The President of the Senate, the Original Public Meaning of the Twelfth Amendment, and the Electoral Count Reform Act*, 73 CASE W. RSRV. L. REV. 1023, 1024 (2023). Professor Muller argues, especially in the wake of the Electoral Count Reform Act, that the Joint Session of Congress has the power to "constrain the President of the Senate as presiding officer." *Id.*

126 *Id.* at 1038–39 (citing Delahunty & Yoo, *supra* note 114, at 29 n. 4).

127 Muller, *supra* note 125, at 1038.

128 *Id.* at 1038–39 (emphasis added). Designation of the President of the Senate as a legislative office is interesting not just for Muller's purposes, but for the analysis of this Note as well. Recall again, it may follow that a President of the Senate that acts "as a legislative officer" is outside the scope of Article II powers such that a President of the United States could direct the President of the Senate to discredit electoral votes via any official act. *Id.*; *see* discussion *supra* Part II; U.S. CONST. art. II, § 1, cl. 3.

129 Consider the role of the President Pro Tempore, for example. *See* Muller, *supra* note 125, at 1038–39*;* U.S. CONST. art. I, § 3, cl. 5.

legislative office that is sometimes, but not always, occupied by the Vice President, efforts to influence this office would not as easily look like a President's official acts because those efforts would not fit solely nor clearly within Article II.[130]

This insight is perhaps best described by Professor Goldstein, who emphatically argues that the Senate President's role is "ministerial."[131] Writing with January 6, 2021, in mind, he argues, "[a]lthough textual and historical arguments rebut Trump's insistence that the President of the Senate can unilaterally decide what electoral votes to count, structural and consequential arguments make the rejection a slam dunk."[132] In the wake of the Court's ruling that unofficial acts are outside the scope of those acts for which the President is immune,[133] Professor Goldstein's article is particularly helpful in ascertaining the extent to which the President of the Senate's role on January 6 steps outside the reach of a President's official acts.

Professor Goldstein concludes that "the Constitution does not empower a President of the Senate to unilaterally reject electoral votes."[134] It would follow that Goldstein interprets the ECA as granting a President of the Senate no power at all other than a ceremonious and ministerial one, quite possibly amounting to no more than that of a master of ceremonies.[135] To this point, Goldstein endeavors to describe the Vice President not as the Vice President but instead as the President of the Senate whenever applicable to January 6.[136]

As examined below,[137] a number of scholars approach wider discussion of the ECA from the point of view that the Act was unconstitutional from its genesis; recall that this point of view was particularly prevalent around the time of the Court's decision in *Bush*

[130] As discussed above, even the raw text of the Constitution, as originally drafted, supports this interpretation, since references to the Senate President exist in both Article I and Article II, thereby at least implying that the Senate President cannot solely be an Article II actor. *See* discussion *supra* Part III; U.S. CONST. art. I § 3, cl. 4; *id.* art. II § 1, cl. 3.

[131] Goldstein, *supra* note 75, at 372.

[132] *Id.* The "bulk" of Goldstein's essay "outlines the textual, historical, and structural arguments" supporting the notion that the President of the Senate plays only a ministerial—and therefore not adjudicatory—role on January 6. *Id.* at 373; *see id.* at 383–410.

[133] *See* Trump v. United States, 603 U.S. 593, 606 (2024).

[134] Goldstein, *supra* note 75, at 411.

[135] *See id.*

[136] *See id.* at 369–78, 411; Muller, *supra* note 125, at 1038–39 (noting that the role or office of the Senate President is not always occupied by the Vice President).

[137] *See infra* notes 142–51 and accompanying text.

v. Gore.[138] Indeed, Vasan Kesavan offers one of the more comprehensive arguments against the constitutionality of the Electoral Count Act.[139]

Yet constitutionality questions aside,[140] Kesavan calls the President of the Senate's role at the counting "ministerial" as well, saying that "[c]onventional wisdom holds that the joint convention of the Senate and House of Representatives does the counting."[141] He further argues that Congress clarified this division of powers in the ECA.[142]

Another scholar, arguing for reform, claims in summation that such "imprecise constitutional rules supposedly augmented by an unconstitutional, overreaching statute" is "not a viable" way to elect the President.[143] Comparing the pure text of Article I, Section 4 and Article II, Section 1, Gigante analyzes the following interpretation of the Framers' intent: "[w]here the Constitution intends Congress to have a superseding power over *State electoral practices*, it says so explicitly."[144] Indeed, even when some scholars claim that the ECA unconstitutionally usurps counting powers from their rightful places to Congress, those scholars by and large still do not assert that such a rightful place was ever with the Senate President.[145]

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[138] *See* Bush v. Gore, 531 U.S. 98 (2000) (per curiam); *see, e.g.*, Kesavan, *supra* note 103, at 1656–61.

[139] *See generally* Kesavan, *supra* note 103 (arguing that Congress exceeded its power in passing the ECA). Contending that the Framers of the Constitution did not contemplate the possibilities of faithless electoral votes, Kesavan in conclusion questions whether this constitutional oversight can be fixed by any means other than constitutional amendment. *Id.* at 1658.

[140] But whether Congress had constitutional authority to do this—to affirmatively make this the case if it had not already been so—is an inquiry of interest to Kesavan. *See id.* at 1758. Kesavan makes this and other arguments to supplement his wider point: that Congress did not have the "font of power" to initially pass the ECA in 1887; that Congress does not have the power to "regulate the manner of presidential election"; that there is no support in the electoral college clauses for the type of bicameralism mandated by the ECA; that the 49th Congress had no power to bind future Congresses to its will; and that the joint convention on January 6 does not have the power "*to judge the validity of electoral votes*." *Id.* at 1661, 1729–58 (emphasis added).

[141] *Id.* at 1659.

[142] *See id.*

[143] Gigante, *supra* note 76, at 100.

[144] *Id.* at 76 (emphasis added). *Compare* U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations*, except as to the Places of chusing [sic] Senators.") (emphasis added), *with* U.S. CONST. art. II, § 1 (containing no such clause as emphasized above).

[145] *See, e.g.*, Gigante, *supra* note 76, at 70–75 (arguing that the power was usurped from the States). *But see* Delahunty & Yoo, *supra* note 114, at 29 (arguing that the Vice President has the power to decide electoral vote questions).

Publishing before the 2016 election, Chris Land and David Schultz argue that the ECA is unenforceable and unconstitutionally restricts the procedural authority that Congress has over itself.[146] These authors argue that no special joint session of Congress was created to be a separate body apart from the individual House and Senate that would have authority "to develop special, binding procedures for counting electoral votes—e.g., the ECA."[147] Instead, the House and Senate are named in their individual capacities in the counting clauses provided in Article II and the Twelfth Amendment, which Land and Schultz argue negates any inference that the Framers intended a special joint session.[148]

After the Electoral Count Reform Act (ECRA), another commentator still attributed "weaknesses" to the original law, claiming that the ECA was "rife with gaps and ambiguities and had, in the words of one election law scholar, been 'lying there like unexploded ordnance since 1887.'"[149] Even in the wake of the ECRA's reform, Kate Hamilton argues that state compliance is still required to "ensure that it is able to serve its intended purpose."[150]

Few scholars do argue that the Vice President holds adjudicative power at the January 6 certification of the Electoral College results. Professors Robert J. Delahunty and John Yoo argue that the Vice President is "the only federal institution [that can] judge the legitimacy of electoral votes, subject in limited cases to judicial review" but also "that the Vice President can only exercise this power over specific types of disputes originating from the states."[151] They conclude:

> The Constitution's best reading requires that the Vice President, acting as President of the Senate, decide the validity of disputed electoral votes. But the Vice President occupies that place in the electoral system only when the states fail to produce a definitive result. The Vice President cannot reject electoral votes on the grounds that the electors'

[146] Land & Schultz, *supra* note 112, at 343.
[147] *Id.* at 346.
[148] *Id.* at 346–47. Clauses 3 and 4 of the Twelfth Amendment "also provide that the House and Senate shall separately elect the President and Vice President in the event of an Electoral College tie, or if the second place finisher in the House vote fails to attain a majority of votes, respectively." *Id.* at 347.
[149] Hamilton, *supra* note 114, at 253 (citing Carl Hulse, *How a Bipartisan Senate Group Addressed a Flaw Exposed by Jan. 6*, N.Y. TIMES (Dec. 22, 2022), https://www.nytimes.com/2022/12/22/us/politics/electoral-count-act-jan-6.html [https://perma.cc/GD3H-CZ4W]).
[150] Hamilton, *supra* note 114, at 270.
[151] Delahunty & Yoo, *supra* note 114, at 29.

> appointments were invalid, nor can the Vice President remand disputed electoral votes to their respective states.[152]

After considering what they describe as three possible interpretations of the Twelfth Amendment, Delahunty and Yoo assert that the ECA allowed Congress to simply choose the option which "accorded itself the maximum power."[153] This view of the Twelfth Amendment was one in which "the Vice President may play only a ministerial role by opening the electoral votes, with any disputes left solely to Congress to resolve by legislation."[154] Nevertheless, Delahunty and Yoo are skeptical that the Constitution vests Congress with any role in resolving counting disputes.[155] The two assert that the Framers had a "broader purpose to exclude Congress from the selection of the President," arguing that "textual and structural clues in the Constitution" support "[assigning] the responsibility for resolving disputes over electors" to the Vice President.[156]

Delahunty and Yoo admit, however, that "[n]either Article II nor the Twelfth Amendment plainly assigns" such responsibility of counting votes to the Vice President specifically.[157] Delahunty and Yoo offer their explanation for their conclusion,[158] including their argument that the ECA is unconstitutional.[159] Plenty of scholars have agreed with them on the latter point.[160]

Nevertheless, the special care amongst multiple scholars to describe such a minister as the President of the Senate (even though they and the Vice President are often the same person) encourages reflection.

V. SYNTHESIS

It is more likely than not that the Vice President wields no Article II power over the electoral count. This is so for myriad reasons. The first is that the predominantly ministerial office of the Senate

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[152] *Id.* at 33.

[153] *See id.* at 53–54.

[154] Delahunty & Yoo, *supra* note 114, at 54. This terminology of a "ministerial role" is often repeated throughout the scholarship. *See* Goldstein, *supra* note 75, at 385–87; Kesavan, *supra* note 103, at 1711–17.

[155] *Id.* at 60. Delahunty and Yoo here present their skepticism via agreeing with the work of Professors Beermann and Lawson. *See* Beermann & Lawson, *supra* note 93, at 300–01.

[156] Delahunty & Yoo, *supra* note 114, at 62.

[157] *Id.*

[158] *Id.* at 62–88.

[159] *Id.* at 81–90.

[160] *See e.g.*, Kesavan, *supra* note 103, at 1758.

President has not been viewed throughout American history—by either lawmakers or scholars—as a crucial entitlement of the Vice President alone.[161] It is not the case that the Senate President is an office permanently occupied by the sitting Vice President such that the two are inseparable.[162] Instead, "[w]henever the Vice President is absent, a president pro tempore presides;" having precisely the Vice President always occupying the chair of the Senate President is not needed for the Senate's business to be conducted.[163] The Senate President much more often serves ministerial purposes within the parliamentary procedures of the Senate—powers which are at home within Article I, to the extent any powers exist at all.[164] The Vice President at times gives a tie-breaking vote when the Senate is evenly divided, which may in fact be the exception that proves the rule.[165] However, that particular power is less often needed than the parliamentarian, ministerial role that the Senate President plays, and that voting power is not implicated at the January 6 counting ceremony.[166]

An additional reason to support the analysis that the Vice President has no adjudicative power under Article II on January 6 is the following. The difference between the ministerial powers and the adjudicative powers at the January 6 ceremony is articulated well in the Constitution, exemplified by the difference between "open[ing]" the votes and "count[ing]" them.[167] As a parliamentarian, such an officer's role is much more strongly encompassed by Article I than by Article II. It then follows that a President's efforts to manipulate the actions of the Senate President here are likely not the sort of core official acts for which the President is fully immune. Instead, a President would likely be only presumptively immune, if at all, for those actions under the Court's analysis in *Trump v. United States*.[168]

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161 Goldstein, *supra* note 75, at 372–73; Muller, *supra* note 125, at 1038–42.

162 *See President of the Senate*, BLACK'S LAW DICTIONARY, *supra* note 20.

163 *See id.*

164 *See* U.S. CONST. art. I, § 3, cl. 4; Goldstein, *supra* note 75, at 410.

165 U.S. CONST. art. I, § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided"). Close reading of the clause reveals that the President of the Senate does not have any voting power except for the narrow case in which the Senate is equally divided. *Id.*

166 *See* U.S. CONST. amend. XII.

167 *Id.*; U.S. CONST. art. II, § 1, cl. 3.

168 *See* Trump v. United States, 603 U.S. 593, 597–98 (2024). A further question of whether a *candidate* for President, even if an incumbent, takes official Article II actions when advancing his or her campaign in an official capacity is outside the scope of this Note, but was considered by the Special Counsel's amended indictment before the case was dismissed. *See supra* notes 13–15 and accompanying text.

Another reason is that the general consensus of secondary literature on the topic furthermore suggests that the Senate President holds no official counting powers at all under the ECA.[169] Moreover, further reform of the country's regime for certifying the electoral count came through the Electoral Count Reform Act of 2022, which clarifies that the Senate President's role is only ministerial.[170] Fortunately, due to the prevalence of modern communications teams within legislative staff, ascertaining the intent of the enacting Congress of this Act is less onerous. Introduced as S.4573 in the 117th Congress by Senator Susan Collins (R-ME), the ECRA expressly specifies that the Vice President's role during the joint session on January 6 is to be ministerial.[171] Senator Collins's press release accompanying the bill provides that the bill "[a]ffirmatively states that the constitutional role of the Vice President, as the presiding officer of the joint meeting of Congress, is solely ministerial and that he or she does not have any power to solely determine, accept, reject, or otherwise adjudicate disputes over electors."[172] As such, the original sponsor's subjective intent behind the ECRA was, in large part, to clarify that the Vice President's role on January 6 is only ministerial.[173] That alone speaks volumes, if not retroactively to January 6, 2021, then at least toward any future Presidents that may opportunistically read the Court's decision in *Trump v. United States*.

If the enacting Congresses of the ECA and ECRA each intended to assert that Congress alone can count electoral votes and resolve any disputes about those votes, then such a power is a clear Article I power.[174] Moreover, the analysis in this Note and in other commentators' work on the original Framers' intent regarding the counting ceremony and of the clarifications made in the Twelfth Amendment supports the conclusion that the Executive Branch does not exert any adjudicative power over its own elections.[175]

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169 *See* discussion *supra* Part IV.

170 *See* Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117-328, 24 Stat. 5233, 5238.

171 S. 4573, 117th Cong. § 15 (2022).

172 *Electoral Count Reform Act of 2022*, SUSAN COLLINS, U.S SENATE, https://www.collins.senate.gov/imo/media/doc/one_pager_on_electoral_count_reform_act_of_2022.pdf [https://perma.cc/CH72-YVKY] (last visited Aug. 30, 2025, at 4:46 PM).

173 *See id.*

174 *See* discussion *supra* Section III.C; *supra* notes 167–70 and accompanying text.

175 As stated above, theories about that power include that it belongs with Congress, or that it belongs with the State electors themselves. *See* discussion *supra* Part IV. However, very little support exists for the conclusion that the Vice President, in his or her capacity as a member of the Executive, holds an adjudicative power over the counting ceremony. *See* discussion *supra* Part IV.

A Vice President, via his or her service as Senate President, may sometimes have proximity to that adjudicative counting power. However, Article I powers are decidedly not Article II powers; to say otherwise would fly in the face of the separation of powers principles that are central to American government.[176] Furthermore, if to govern disputes over electoral votes is not an Article II power, then a President cannot reach it within the long arm of his or her core Article II powers, and no core official acts encompass that power.[177] If the true intent of the drafters of the ECA and the other relevant bodies of law was to give to the Vice President control over electoral vote disputes, then the opposite would be true. This, however, cannot be the case based on the analysis described above.[178]

VI. CONCLUSION

The *Trump v. United States* Court stated that "[p]residing over the January 6 certification proceeding at which Members of Congress count the electoral votes is a constitutional and statutory duty of the Vice President."[179] The Court concluded that the indictment's allegations pertain to acts that "thus involve official conduct, and Trump is at least presumptively immune from prosecution for such conduct."[180] However, this analysis is likely flawed.

The text of the relevant governing law, the original intent of those who drafted that law, the nearly 250 years of history and tradition surrounding that governing law, and the consensus of the secondary literature all indicate that any activity of the Vice President on January 6 is, if it encompasses any power at all, merely a ministerial power subject to Article I of the Constitution.[181] *Inclusio unuis est exclusio alterius*: separation of powers principles indicate that these Article I duties are outside the reach of an Executive's Article II powers.[182] Therefore, any efforts by a President to influence a Vice President's activity on January 6 should at least be treated as outside the scope of core official acts for which the President would be fully immune from prosecution under *Trump v. United States*. In fact, these efforts by Trump and similar efforts by a hypothetical future President should be treated as outside the scope of any official acts.

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176 *See* THE FEDERALIST NO. 47 (James Madison).
177 *See* Trump v. United States, 603 U.S. 593, 609–10 (2024).
178 *See* discussion *supra* Parts III and IV.
179 *Trump*, 603 U.S. at 623.
180 *Id.*
181 *See* discussion *supra* Part IV.
182 *See Expressio Unius Est Exclusio Alterius*, BLACK'S LAW DICTIONARY (12th ed. 2024).

In the alternative, the presumptive immunity that results is easily rebutted.